Supreme Court, U.S.
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No. 86-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LORENTZ W. HANSEN,

Petitioner,

—v.—

PRENTICE-HALL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT PRENTICE-HALL, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a person claiming to have been libeled by a court slip opinion, later amended by the court to delete the allegedly defamatory language, sue a publisher of the verbatim text of the original slip opinion notwithstanding that the publisher did not have notice of the amendment until after publication and a state statute provides that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding . . ."?

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Respondent, Prentice-Hall, Inc., opposes the Petition for a Writ of Certiorari. The decision of the Second Circuit Court of Appeals does not conflict with a decision of any other circuit Court of Appeals or the New York Court of Appeals. The only issue raised by the petition is the construction of a state statutory privilege, which is not a matter requiring review by this Court.

STATEMENT OF THE CASE

Petitioner was trial and appellate counsel for the plaintiff/taxpayer in *Lyddan v. United States*, 721 F.2d 873 (2d Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984). On November 1, 1983, the Court of Appeals issued a slip opinion (the "Slip Opinion") affirming a judgment after trial against the taxpayer, which contained the following sentence:

> In his memorandum decision, [District] Judge Murphy perceptively opined that Lyddan's testimony was tailored to the facts of relevant case law, particularly *Sydnes v. Commissioner*, 577 F.2d 60 (8th Cir. 1978).

(A93.)*

Although the Slip Opinion did not refer to Petitioner as the taxpayer's trial attorney, Petitioner nevertheless contends that the above-quoted sentence implied that he "persuaded and suborned his client . . . to testify falsely and commit perjury" (A5-6) and imputed to him "unprofessional, unethical and dishonest conduct . . . and also . . . malpractice of law . . ." (A6).

On November 3, 1983, Petitioner sent a mailgram to Circuit Judge Pratt requesting the Court to withhold circulation of the Slip Opinion to allow Petitioner "to persuade the Court to eliminate the erroneous statement about Taylor [sic: "tailored"] testimony . . ." (A119). On November 9, Petitioner moved in the Court of Appeals to modify the Slip Opinion "to omit accusations of impropriety" allegedly made against him (A120).

Meanwhile, on November 8, Respondent, which publishes the *American Federal Tax Reports* (2d Series) ("AFTR"), received from the Court of Appeals its subscription copy of the

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* "A" citations refer to the "Appendix for Plaintiff-Appellant" in the Court of Appeals; "SA" citations are to the "Supplemental Appendix of Appellee-Cross-Appellant Prentice-Hall, Inc." in that Court.

Slip Opinion (A98-99). Respondent published the Slip Opinion in the November 17, 1983 AFTR advance sheet (A100-102; SA4; SA13-15).

In fact, on November 9, 1983, in apparent response to Petitioner's November 3 mailgram and before receiving Petitioner's motion to modify, the Court of Appeals amended the Slip Opinion to delete the sentence that Petitioner considered objectionable. However, Respondent first learned of the amendment only on November 28, 1983, when it received from Circuit Judge Pratt's clerk a copy of the undated order amending the Slip Opinion (A99; A103-105).[1] Although Respondent thereafter published the amended version of the Circuit Court opinion in the permanent volume of the AFTR (A106), Petitioner nonetheless brought suit for libel in New York State Supreme Court. Respondent removed the case to the United States District Court for the Southern District of New York which, on September 11, 1985 (A17), granted Respondent's motion for summary judgment.

REASONS FOR DENYING THE WRIT

In affirming summary judgment for Respondent, the Second Circuit Court of Appeals held that Respondent's publication of the Slip Opinion was absolutely privileged under Section 74 of the New York Civil Rights Law, notwithstanding that the Slip Opinion subsequently had been amended. The Circuit Court's opinion is consistent with the only other Court of Appeals decision addressing this issue. Furthermore, contrary to Petitioner's contention, the Second Circuit's decision does not conflict with any controlling decision of the New York Court of Appeals.

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1 Petitioner's verified complaint alleges that he had given Respondent notice of the amendment before publication of the AFTR advance sheet. However, when later confronted with facts showing that he could not have known about the amendment before November 17, 1983—the advance sheet publication date—Petitioner retreated to arguing that he "believed" that he gave notice. *Hansen v. Prentice-Hall, Inc.*, 788 F.2d 892, 893 (2d Cir. 1986). In the present Petition for a Writ of Certiorari, Petitioner has abandoned his contention of prior notice.

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS OR THE NEW YORK COURT OF APPEALS.

The Third Circuit Court of Appeals is the only other court to address in a similar context the scope of the immunity conferred on reports of judicial proceedings. In *Lowenschuss v. West Publishing Co.*, 542 F.2d 180 (3d Cir. 1976), the court affirmed dismissal under both New York and Pennsylvania law of the plaintiff/lawyer's libel suit against a legal publisher for reporting a court opinion that charged the plaintiff with misconduct, notwithstanding that the publisher had notice of the plaintiff's exoneration before publication. There thus is no conflict between the Third Circuit's decision in *Lowenschuss* and the Second Circuit's decision in this case.

Nor is there any conflict between the Second Circuit's decision and any controlling decision of the New York Court of Appeals. Indeed, there is no New York decision directly on point. The cases cited by Petitioner—*Stevenson v. News Syndicate Co.*, 302 N.Y. 81 (1950) and *Lewisohn v. Dial Press Inc.*, 264 App.Div. 370, 35 N.Y.S.2d 551 (1st Dep't 1942)—are inapposite, for neither involved verbatim publication of a court opinion. As the Second Circuit Court of Appeals observed in this case, in both *Stevenson* and *Lewisohn* "the publication was not of the opinion itself but rather of defamatory facts for which a judicial opinion or filing was cited as authority . . . [whereas] [h]ere Prentice-Hall published an indisputably accurate rendition of . . . [the] original opinion . . . ." 788 F.2d at 893.

The only decision of the New York Court of Appeals even arguably relevant is *Lee v. Brooklyn Union Publishing Co.*, 209 N.Y. 245 (1913), not cited by Petitioner. There, the court held under the predecessor to Section 74 of the New York Civil Rights Law that the reporter of a judicial proceeding did not lose its immunity from libel suits even though it was subsequently determined that the proceeding was improper. The

New York court ruled that the reporter was not responsible for determining whether the court's action constituted official judicial proceedings within the meaning of the immunity statute. The decision of the Second Circuit Court of Appeals in this case similarly holds that Respondent—having received a Slip Opinion directly from the court—had no duty to question whether the opinion was really an official court opinion. Thus, Petitioner does not raise an issue meriting review with his argument that Respondent had a duty to ascertain before publication whether the Slip Opinion had been modified by the Court of Appeals, for the Second Circuit's rejection of that argument is consistent with the only New York decision of any relevance.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Of Counsel:

MAILMAN & GIGANTE

August 11, 1986